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In the Supreme Court of the United States

No. _____.

OCTOBER TERM, 1972

THE CITY OF AKRON, OHIO,
Petitioner,

vs.

VILLAGE OF MIDDLEFIELD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Petitioner, The City of Akron, prays that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Ohio, denying a hearing from a decision of the Court of Appeals of Trumbull County, Ohio, which affirmed a Common Pleas Court decision of Trumbull County impairing Petitioner's right of contract and denying Petitioner of its property without due process of law.

OPINIONS BELOW

The opinion of the Court of Common Pleas of Trumbull County (September 23, 1970) is unreported and is set out herein as Appendix G, page A13. The opinion of the Court of Appeals of Trumbull County, Ohio (November 23, 1971) is unreported and is annexed hereto as Appendix E, page A5. The Supreme Court of Ohio wrote no opinion.

JURISDICTION

(i) This action, for declaratory judgment, injunction and damages, was brought by the Respondents in the Court of Common Pleas of Geauga County, Ohio. Venue was removed to the Common Pleas Court of Trumbull County, Ohio.

(ii) A copy of the judgment of the Common Pleas Court of Trumbull County entered April 29, 1971, is attached hereto as Appendix F, page A9. The date of the judgment of the Court of Appeals of Trumbull County, Ohio, Eleventh District, here sought to be reviewed is January 6, 1972. A copy of the entry of the Court is attached hereto as Appendix D, page A4.

On February 3, 1972, Petitioner filed its Notice of Appeal on the Supreme Court of Ohio as of right on constitutional questions and also on condition that a motion to certify the record be allowed. The April 28, 1972, Journal Entry of the Supreme Court of Ohio dismissing the appeal as of right and overruling the motion to certify the record is attached hereto as Appendix C, page A3 and Appendix B, page A2, respectively, together with its Journal Entry of May 18,1972 denying the application for rehearing (Appendix A, page A1). It is from the judgments of the Supreme Court of Ohio that this motion to certify is being made.

(iii) Jurisdiction is conferred upon this Honorable Court by virtue of the terms of Section 2101 (C) of the Judicial Code, 28 U.S.C. Section 2101 (C).

QUESTIONS PRESENTED

1. May a state court disregard a United States Supreme Court decision (*Sears, Trustee v. The City of Akron*, 246 U.S. 242 (1918)) which considered the nature and extent of Petitioner's grant, and then by applying subsequent statutory enactments destroy those property rights arising out of that grant, all in violation of the constitutional guarantees of contract rights and due process?

2. May a state court construe subsequent legislative enactments to limit the nature and extent of a vested legislative grant (which grant predated a state constitutional home rule amendment) in violation of United States Constitutional guarantees of due process and against impairment of obligation of contracts?

3. May a state court determine that a property right vested in the Petitioner and granted by the state (such as Appendix J, page A32) does not convey any special powers of eminent domain, when such determination is based upon unmentioned subsequent statutory enactments?

4. May a state court deny that the Petitioner has any special right to appropriate publicly owned lands under a special grant (Appendix L, page A39) when such denial is pro tanto a taking of Petitioner's property and a denial of due process of law?

STATUTES AND CONSTITUTIONAL PROVISIONS

This case involves Article I, Section 10 and the 14 Amendment, Section 1, to the United States Constitution. These provisions provide, in pertinent part, as follows:

Article I, Section 10.

> "No state shall . . . pass any . . . law impairing the obligation of contracts . . . "

14th Amendment, Section 1.

> " . . . No state shall . . . deprive any person of . . . property, without due process of law; . . . "

The above constitutional provisions are set forth in their entirety in Appendix H, page A21.

STATEMENT OF THE CASE

1. The Facts

The parties are referred to as they appear in the caption herein. This is an action concerned with the respective rights and duties of political subdivisions as they are affected by a governor's deed to the Petitioner, The City of Akron. In 1911 the Ohio State Legislature granted to the Petitioner, the right to withdraw water from the Little Cuyahoga River, the Big Cuyahoga River, the Tuscarawas River, and the tributaries thereto. The Petitioner accepted said Grant by legislature act (Appendix K, page A35), and in reliance thereon erected certain impounding reservoirs to provide its inhabitants, as well as inhabitants of the areas surrounding it, with water. In 1915 facilities to supply water were put into operation by the construction of a dam and reservoir, Lake Rockwell Reservoir, on the Cuyahoga River about two miles above the City of Kent, in Portage County, Ohio; a treatment plant; a pumping station; and a 36-inch transmission main from the treatment plant to the City of Akron. In 1939, East Branch Reservoir in Geauga County was completed.

In 1940, the Petitioner constructed the Mogadore Reservoir, located partly within Summit and Portage Counties, on the headwaters of the Little Cuyahoga River as a multi-purpose project to provide untreated water for use by industries, to provide flood protection, and to provide recreational facilities.

Since the construction of Petitioner's original treatment plant, in 1915, expansions and modernizations have been made.

In 1912, the Petitioner's distribution system consisted of approximately 106 miles of water mains compared to today's 963 mile water distribution network, which includes some 7,360 fire hydrants. This system serves 86,080 accounts, to approximately 382,000 people. Out of the 86,080 accounts, there are approximately 550 industries and 150 schools. Four of the five largest rubber firms in the world are located in Akron employing more than 34,000 people.

The Petitioner's water system is the focal point for the Akron metropolitan zone. The cessation of development of the Akron water system will result in the termination of regional residential, commercial and industrial development. It is estimated that the Akron metropolitan region may service an additional projected population of 603,000 people.

While the rate of growth within the City of Akron in recent years has sharply been reduced, the Akron metropolitan area growth rate continues unabated. At present, Petitioner supplies water under contract to the cities of Fairlawn, Stow, Tallmadge, and Mogadore, with limited services in the Townships of Springfield, Bath, Northampton, and Copley. Water is supplied to General Motors and Chrysler plants, in the Townships of Hudson and Twinsburg, respectively, under separate contracts. See the

Akron Water System map, designated Appendix M, page A44.

The Petitioner has expended large sums of money for the acquisition of properties in anticipation of future needs for water impounding facilities. And the Petitioner now contemplates construction of an additional water impounding reservoir, formerly designated as the Hubbard Road Reservoir, now to be known as the William M. Wasick Reservoir.

The proposed William M. Wasick Reservoir site is estimated to encompass an area of 7,000 acres in Geauga County. The Petitioner has already acquired, by negotiated purchase, 4,000 acres at a total expenditure of $690,181.00 as same have become available on the open market.

The elevation of the proposed William M. Wasick Reservoir is 1,115 feet above sea level. Proposed secondary sewage treatment facilities of the Villages of Burton and Middlefield are scheduled for construction at an elevation below the proposed reservoir, which would cause such facilities to be inundated.

In anticipation of the Petitioner's construction of the William M. Wasick Reservoir, the Respondents initiated the within action.

2. The Case

On May 5, 1970, the Villages of Middlefield, Ohio, and Burton, Ohio; the Commissioners of Geauga County; the Trustees of the Townships of Burton, Middlefield, and Troy; and Burton Rubber Processing, Inc., an Ohio Corporation, filed suit in Geauga County Common Pleas Court, being Case No. 19872, against The City of Akron, Ohio, Charles Pettit, and Ron Millar: Under the First Cause of Action the Respondents herein sought a Declara-

tory Judgment as to the right of The City of Akron, Ohio to appropriate the Respondents' lands, either under the Constitution and Statutes of the State of Ohio, or under a special act, hereinafter referred to as the 1911 Grant (Appendix L, page A39) of the Legislature of the State of Ohio. Under the Second Cause of Action the Respondents sought a Restraining Order to enjoin the City of Akron from appropriating Respondents' property for reservoir purposes. And, under the Third Cause of Action, the Village of Middlefield sought damages in the sum of Fifty Thousand Dollars ($50,000.00). Lastly, the Respondents requested the Court to grant such other relief as it might find just and equitable under the circumstances.

The parties Pettit and Millar moved the Court for an order dismissing them as parties, which motion was granted. Venue was removed to Trumbull County, Ohio and the Petition was refiled in Trumbull County Common Pleas Court, designated Case No. 81117, against the city of Akron only.

The Court, sitting in Geauga County, heard testimony for two days, commencing on September 8, 1970. On September 23, 1970, the Court filed an Opinion in the case (Appendix G, page A13).

The Petitioner filed an Application for Reconsideration of Opinion. On April 29, 1971, the Court modified its Opinion of September 23, 1970, to permit appropriation by the Petitioner of cemetery lands, pursuant to §719.031, Ohio Revised Code and also entered its final Judgment (Appendix F, page A9). The Judgment granted the withdrawal of the Third Cause of Action, with prejudice; found that the Second Cause of Action, seeking a restraining order, was premature; and decreed, concerning Items 2 and 3 of the First Cause of Action, that:

"2. The Defendant, The City of Akron, (Petitioner herein), may not appropriate properties within the Village of Middlefield and Burton, which are already devoted to a public use and which appropriation would either destroy the existing use or interfere with it to such an extent as would be tantamount to destruction.

"3. That Defendant, The City of Akron, (Petitioner herein), has no special grant or authorization, by the 1911 Grant from the State Legislature, to appropriate publicly owned lands already devoted to a public use when such appropriation would wholly defeat or supersede the former use."

The Judgment, as journalized on April 29, 1971, (Appendix F, page A9) is the final order from which an appeal was taken to the Court of Appeals.

The Court of Appeals rendered its Opinion (Appendix E, page A5) which was directed to only two of the nine Assignments of Error filed. The Appellate Court incorporated the Opinion of the trial court "where applicable," and affirmed the trial court's judgment (Appendix D, page A4).

The Petitioner filed a motion for an order directing the Trumbull County Court of Appeals to certify its record to the Ohio Supreme Court and at the same time Petitioner gave notice of appeal to both courts. The Supreme Court of Ohio overruled the motion (Appendix B, page A2) and dismissed the appeal for the reason that no substantial constitutional question exists (Appendix C, page A3). Thereafter, Petitioner filed a motion for rehearing with the Supreme Court of Ohio which was likewise denied (Appendix A, page A1).

3. Federal Question

The federal questions sought to be reviewed were raised in this case by the Petitioner in the first instance, in

the answer filed in the Common Pleas Court, it being alleged as follows:

"First Defense

"2. In 1911, the General Assembly of the State of Ohio granted to the Respondent (Petitioner herein) a perpetual right to 'use and occupy certain waters and lands of the State for waterworks and park purposes."

"3. In 1918, the United States Supreme Court decided the case of *Sears, Trustees v. The City of Akron*, 246 U.S. 242, wherein the court expressly held that this Respondent (Petitioner herein), under the 1911 grant above mentioned, was authorized to exercise the state's power of eminent domain; and secondly, that the courts may not inquire into the city's propriety in determining the necessity and extent of appropriations necessary therefor."

"Second Defense

"5. (f) The Respondent (Petitioner herein) has, since 1911, continuously and openly proceeded, under the express and implied powers granted to it by the State of Ohio, to acquire, by purchase and condemnation, certain lands in Geauga and Portage Counties."

These federal questions were continuously argued by the Petitioner in each court wherein an appeal was filed. The brief and assignments of error filed with the Trumbull County Court of Appeals set forth the following arguments:

"Assignment of Error No. 2

"The trial court erred in holding that a municipality which is the recipient of a special Grant, to occupy and use waters, from the State Legislature, has no special power to appropriate publicly owned lands already devoted to a public use."

"Assignment of Error No. 3

"The trial court erred in denying the right to a municipality to appropriate publicly owned lands, for the purpose of occupying and using waters, when such denial was pro tanto an appropriation of the right to occupy and use said waters."

"Assignment of Error No. 8

"The trial court erred in failing to recognize the 1911 Grant as a right which ripened into a vested contract upon the adoption of the Constitutional home rule amendment of 1912."

"Assignment of Error No. 9

"The trial court erred in denying that Appellant (Petitioner herein), has a right to appropriate, either in fact or in law, Appellees' property, after Appellant has expended substantial sums of public moneys relying upon the past practices as between the Appellant and the Appellees."

Again the Petitioner raised those same federal questions in its Memorandum in Support of Jurisdiction of the Ohio Supreme Court, wherein it stated:

"Proposition of Law No. 3

"A municipality which is the recipient of a special Grant, to occupy and use waters from the State legislature, has a special power to appropriate publicly owned lands already devoted to a public use."

"Proposition of Law No. 4

"The denial of a special right under the 1911 Grant, to appropriate publicly owned lands, for the purpose of occupying and using waters, is pro tanto an appropriation of the right to occupy and use said waters."

"Proposition of Law No. 9

"A special grant from the General Assembly in 1911, ripened into a vested contract upon the adop-

tion of the Constitutional home rule amendment of 1912."

"Proposition of Law No. 10

"Where a municipality has expended substantial sums of public monies relying upon the past practices as between itself and other governmental subdivisions, such municipality has the right to appropriate, either in fact or in law, the property of those other governmental subdivisions.

REASONS FOR GRANTING THE WRIT

A federal question is presented when a state court, either expressly or by necessary implication gives effect to subsequent laws of the state whereby the obligation of contract is impaired.

Additionally, a federal question is presented when a state court, either expressly or by necessary implication, construes a contract in such a manner as to render it inoperable and therefore valueless. A construction which results in a deprivation of property rights without the attendant due process is likewise reviewable by this court in order to determine whether a valid contract existed, and whether the judicial construction rendered the contract without force in law constituting an outright taking of property within the meaning of the 14th Amendment of the United States Constitution.

This Court has decided in the case of *Sears, Trustee vs. The City of Akron,* 246 U.S. 242, (1918), that Petitioner was possessed of a special property right; the 1911 Grant (Appendix L, page A39). This grant was formed between parties competent to contract, there was an offer and an acceptance, and, the contract is entitled to constitutional protection.

Ohio Constitutional home rule amendments grant powers to municipalities which may not be divested by the State. At the time of the grant in question, the State of Ohio, under the doctrine laid down in *Trenton vs. New Jersey*, 262 U.S. 182 (1923), could have subsequently divested the Petitioner of the grant, without consideration of the due process or impairment of contract clauses. However, after the Petitioner had accepted the grant (Appendix K, page A35) and after the people of the state, by constitutional amendment, granted home rule powers to municipalities, the state could no longer divest the Petitioner of the grant without application of the contract clause and the 14th Amendment. Petitioner contends that the 1911 Grant constituted a contract by virtue of the passage of the Ohio State home rule amendment in 1912. *New Orphans' Asylum of Colored Children of Cincinnati v. Board of Tax Appeals, et al.*, 150 Ohio St. 219, 37 Ohio Ops. 470 (1948).

This Court recognized, in *Sears, Trustee v. The City of Akron*, 246 U.S. 242, (1918), that the grant from the legislature of Ohio, granted rights to Petitioner beyond the general power of appropriation available to Akron under the general laws of Ohio. This Court further recognized that Petitioner proceeded, under the grant, to develop the water resources and that a Resolution (Appendix K, page A35), passed on May 27, 1912, declared Petitioner's intention to appropriate all the waters, above Kent, Ohio, of the Cuyahoga River and tributaries, and appropriated the same by an Ordinance (Appendix K, page A36), effective September 10, 1912, which was a valid existing law when the new Ohio Constitution became effective on November 15, 1912. The Petitioner has consistently pursued the development of the aforementioned waters under the grant, the aforementioned Resolution and Ordinance under the authority of *Sears, Trustee v. The City of Akron*, 262 U.S. 242 (1918).

The grant, to Petitioner (Appendix L, page A39) gave the right to "occupy and use" certain waters and lands of the state. As an incident to such contract it is necessarily implied therefrom, that there is a like right to condemn. The need for implying the power to condemn can readily be seen, when one considers that the only way the waters can feasibly be *occupied and used* is to provide a method to reduce the waters to possession. In order to reduce the waters to possession the right to appropriate is implied. The impairment of the obligation of contract in the instant case arises by the deprivation of the benefits of the contract, i.e. the right to reduce the waters to possession. It is evident that the rights intended to be conferred by the grant included a mode of acquiring possession. And an alteration of that contract, by judicial fiat, dispensing with such condition, elementary to the implementation of the grant, lessens part of the contract obligation and substantially defeats its end.

Constitutional protection must exist as against a judicial decision which so construes a contract (Appendix L) that it impairs the obligations thereunder and renders the whole ineffectual. Especially where, as here, the interpretation is based upon subsequent laws.

The Ohio Courts in the instant case have ignored the teaching of *Sears, Trustee v. The City of Akron*, 246 U.S. 242 (1918) by applying the general laws of Ohio, i.e. §719.01 Revised Code (Appendix L, page A27), which was passed subsequent to the new constitution, by holding that the grant confers no special right to appropriate public lands. The Ohio Courts have ignored the rights of the grant, which were vested upon the effective date (November 15, 1912) of the new Ohio Constitution, by permitting governmental subdivisions, other than the State, to thwart the continued implementation of the grant. The Ohio Courts have also ignored the doctrine of laches as against

the Respondents whereby Petitioner, in reliance on the grant, and past practices, has expended substantial monies since 1920 in acquiring lands for the proposed William M. Wasick Reservoir. *Munn et al., v. Horovitz, et al.*, 175 Ohio St. 521, 26 Ohio Ops. 2d 208 (1964).

The Legislature of the State of Ohio has consistently recognized, by statutory enactments, subsequent to the new Constitution, that Petitioner has certain protected rights under the grant which the State itself is precluded from amending or repealing. See Appendix I, page A23 and A31.

The State Courts have, in effect, by judicial fiat created an amendment to the Ohio Constitution whereby lesser governmental subdivisions, such as the Respondents, may now do that which the State itself may not do. See §123.69 and 1523.12, Revised Code, Appendix I, pages A23 and A31.

To interpret the grant in a manner other than that set forth above, defeats the grant and renders it useless. The General Assembly of the State of Ohio certainly intended to grant something more than an occupation and use without any method of implementing such occupation and use.

To interpret the grant as giving a right to occupy and use the waters, without anything more, is in fact an impairment of that contract right. Contracts must be construed in a reasonable fashion so as not to result in an absurd conclusion. A contract should be construed so as to give effect to the intention of the parties. It is clear from the sequence of events, by the state legislature (First, by making the grant to the Petitioner; and Secondly, by the passage of later laws requiring that the state itself refrain from interfering with the rights given to Petitioner under the grant) that the state did not intend that it, or lesser political subdivisions, should in any wise interfere

with the effectuation of the grant. The grant plainly implies that the Petitioner is entitled to appropriate such lands, public and private, as may be necessary to implement the grant. And §719.01 (M), Revised Code, (Appendix L, page A27), does not restrict the rights under the grant.

The lower court's interpretation of the nature and extent of the 1911 Grant impairs those contract rights granted Petitioner under it. Article I Section 10 declares that no state shall pass any law impairing the obligation of contracts. The State of Ohio, through the General Assembly, prescribed the form and determined the effect of the Grant. In the judicial construction of the Grant by the lower courts, as to the nature and extent of its terms, there was created, so far as the contract rights acquired under it are concerned, an amendment to the Grant by applying §719.01 (M), Revised Code, (Appendix L, page A27) as a limitation thereon. This is a law impairing the contract obligation. Additionally, such impairment results in taking of property (the contract) without due process of law.

Property rights such as the 1911 Grant, are vested contractual rights which cannot be taken away except by due process of law.

The privileges stemming from the 1911 Grant are not subject to legislative regulation since a vested right in them exists by virtue of the passage of the home rule amendment. The withdrawal of those privileges can legally be made only upon a showing that there was compliance with due process of law.

The rule has been well established that an owner of property cannot be deprived of any of the essential attributes which belong to the right of property. In the instant case, included within the right of the grant to Pe-

titioner is the implied right to condemn in order to reduce the water to possession. This right of condemnation is a legitimate result and necessary element of the Grant and is a constitutionally protected right.

CONCLUSION

This motion to certify the record presents a situation where substantial constitutional rights of the Petitioner have been or are being violated unless relief is granted. Protection by this Court is sought to preserve the Petitioner's rights to hold property free of any taking which is in violation of the due process clause of the U. S. Constitution and the right to enjoy the benefits of a contract without impairment, in violation of Article I, Section 10.

The operation and effect of the state court's decision by applying the provisions of § 719.01 (M), Revised Code, (Appendix L, page A27) is to extinguish and destroy the property of the Petitioner and it is unconstitutional by reason of its violating the guaranty of due process. So that the state court's decision results in a deprivation of property within the meaning of this constitutional guaranty since it deprives the owner, Petitioner, of one of the grant's essential attributes; destroys the grant's value; restricts the grant's common, necessary or profitable use, and; imposes conditions upon the right to hold or use the grant and therefore seriously impairs its value.

The Petitioner's property (Appendix L, page A39) should have been recognized by the lower courts, as a special right, carrying with it the implied right to appropriate those lands necessary to effectuate the grant and as not being subject to the general laws. In order to reduce the waters to possession, (which waters are set forth in the grant) an implication arises of a like right

to appropriate. The lower courts have failed to imply those powers necessary to effectuate the grant and have even gone so far as to refuse to recognize the grant as a special contract right, contrary to *Sears, Trustees vs. City of Akron,* 246 U.S. 242 (1918), and *Trenton vs. New Jersey,* 262 U.S. 182 (1923). This construction by the state courts has resulted in the loss to Petitioner of those constitutional guaranties of due process of law and against impairment of contract.

In view of the foregoing, it is respectfully submitted that this Petitioner has properly invoked the appellate jurisdiction of this Court.

Respectfully submitted,

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and

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APPENDIX A

Order of the Supreme Court of Ohio
Denying Rehearing

(Entered May 18, 1972)

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

VILLAGE OF MIDDLEFIELD, *et al.*,
Appellees,

VS.

CITY OF AKRON,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

APPENDIX B

Order of the Supreme Court of Ohio Overruling Motion to Certify

(Entered April 28, 1972)

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

VILLAGE OF MIDDLEFIELD, *et al.*,
Appellees,

vs.

CITY OF AKRON,
Appellant.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR TRUMBULL COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this Motion is overruled.

APPENDIX C

Order of the Supreme Court of Ohio Dismissing Appeal As of Right

(Entered April 28, 1972)

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

VILLAGE OF MIDDLEFIELD, *et al.*,
Appellees,

vs.

CITY OF AKRON,
Appellant.

APPEAL FROM THE COURT OF APPEALS FOR
TRUMBULL COUNTY

This cause, here on appeal as of right from the Court of Appeals for Trumbull County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court *sua sponte* dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX D

Judgment of the Court of Appeals, Eleventh Appellate District of Ohio

(Filed January 6, 1972)

No. 1981

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT OF OHIO,
TRUMBULL COUNTY

VILLAGE OF MIDDLEFIELD, *et al.*,
Plaintiffs-Appellees,

vs.

THE CITY OF AKRON, OHIO,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS FOR TRUMBULL COUNTY, OHIO

This cause came on for review before this Court of the transcript, Assignments of Error and Briefs, and oral argument, and it is the judgment of this Court that the judgment of the trial court be and is hereby affirmed. See Opinion.

APPENDIX E

Opinion of the Court of Appeals, Eleventh Appellate District of Ohio

(Filed November 23, 1971)

No. 1981

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT OF OHIO,
TRUMBULL COUNTY

VILLAGE OF MIDDLEFIELD, *et al.*,
Plaintiffs-Appellees,

vs.

THE CITY OF AKRON, OHIO,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS FOR TRUMBULL COUNTY, OHIO

JONES, J.

On May 5, 1970 a petition for declaratory judgment, injunctive relief and money damages was filed in Geauga County, Ohio on behalf of the Commissioners and others of Geauga County against the City of Akron and others. Upon oral motion made by all the parties, a consent to venue change was ordered and the case was transferred to the Trumbull County, Ohio, Court of Common Pleas. An answer was then filed to the Petition.

The testimony was heard and the issues determined by Hon. Lynn B. Griffith, Jr. of the Trumbull County, Ohio, Court of Common Pleas. Judge Griffith's judgment

order was filed with the Clerk on April 29, 1971 and a Notice of Appeal was filed with the same Clerk on May 19, 1971, exactly twenty days thereafter and within rule. Accordingly, this case is before the Court as an appeal by the City of Akron upon questions of law only from a portion of the Trial Judge's entry as follows:

> "2. The defendant, The City of Akron may not appropriate properties within the Villages of Middlefield and Burton, which appropriation would either destroy the existing use or interfere with it to such an extent as would be tantamount to destruction.
>
> 3. That defendant, The City of Akron, has no special grant or authorization, by the 1911 grant from the State Legislature, to appropriate publicly owned lands already devoted to a public use when such appropriation would wholly defeat or supersede the former use."

Nine errors are assigned and masterfully briefed and counterbriefed. After considering the original papers, pleadings, testimony, exhibits, arguments, and briefs, we are of the opinion that the judgment must be affirmed. We hold that the 1911 grant did not give special power to the City of Akron to appropriate lands beyond Summit County so as to be able to reduce to possession certain waters. The grant of 1911 permits the City of Akron:

a. The right to use certain waters

b. The right to come upon these waters for the purpose of constructing reservoirs *in Summit County.*

Therefore, the City of Akron's right to appropriate outside its own territorial boundaries is only the same right as any municipality might have and is not expanded by the 1911 grant. As to the right (or superior right) of

one municipality to appropriate land belonging to another municipality, we are governed by the limitations set out in the *Blue Ash* case (*The Village of Blue Ash v. The City of Cincinnati*, 173 O.S. 345).

Syllabus.

"1. A general grant of power given by constitutional authority to a municipal corporation to condemn land within or without its corporate limits for the establishment of public utilities such as airports landing fields or other air navigation facilities does not extend to the appropriation of a public street in another municipal corporation which is maintained by such municipal corporation in the performance of a governmental function.

2. Where a municipal corporation to which a general power of eminent domain is given by law seeks to exercise its power with respect to property in another municipal corporation already devoted to public use, its action may be enjoined if the proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction, unless power so to do is expressly authorized or arises by necessary implication."

The Blue Ash case was written by the Hon. Arthur Doyle of the Ninth District Court of Appeals while on assignment to the Ohio Supreme Court. Our high regard for Judge Doyle is affirmed after reviewing his clearly written and logical opinion. We follow the principle of the *Blue Ash* case (supra) although an airport runway extension was involved in Blue Ash together with a village street. In the case at bar, waterways and storage of water are involved as well as village and/or municipal sewage plants, roads and bridges, not all of which are within

incorporated limits. We do not limit the application of *Blue Ash* (supra) solely to the facts of that case.

It is clear that the question of relocation or modification of the sewage plants of Middlefield and Burton and of the roads and bridges was not before the Trial Court. This was an avenue open for the appropriating municipality in the Blue Ash case (supra), but not involved in the case at bar.

For the reasons stated herein and for the reasons stated (where applicable) by Judge Griffith, Jr., whose excellent Opinion is incorporated herein, the judgment is affirmed.* All of the errors assigned are rejected. Costs to the City of Akron.

/s/ GEORGE M. JONES
Judge George M. Jones

COOK, P.J. Concurs
O'NEILL, J. Concurs
Seventh District, Sitting by
Assignment in Eleventh District.

*Judge Griffith, Jr.'s Opinion appears as Appendix G herein.

APPENDIX F

Judgment of the Court of Common Pleas of Trumbull County, Ohio

(Filed April 29, 1971)

No. 81117

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, TRUMBULL COUNTY, SS.

VILLAGE OF MIDDLEFIELD, *et al.*,
Plaintiffs,

vs.

THE CITY OF AKRON, OHIO,
Defendant.

Opinion modified to permit appropriation of cemetery lands pursuant to O.R.C. 719.031, in all other respects it is affirmed on reconsideration.

GRIFFITH, JR., J.

JUDGMENT

This cause came on for hearing before the Honorable Lynn B. Griffith, Jr., Judge of the Court of Common Pleas, Trumbull County, upon the pleadings, testimony and briefs submitted; upon Defendant's, City of Akron's, Motion for Reconsideration; and upon the Plaintiff's, the Village of Middlefield's, oral motion to withdraw the third cause of action as set forth in the Complaint.

The facts as found by the Court are as follow:

1. In 1911 the Ohio State Legislature authorized a grant which gave the Defendant the right to withdraw water from the Little Cuyahoga River, the Big Cuyahoga River and the Tuscarawas River.

2. Subsequent to such grant the Defendant did erect certain impounding reservoirs to provide a municipal water supply within its corporate limits, as well as for a water supply for surrounding suburbs and industries located beyond its corporate limits.

3. The Village of Middlefield has, since 1952, provided primary treatment of sewage and the Ohio Water Pollution Control has ordered the Village to further refine its sewage treatment. The Village of Burton, likewise, has been requested to provide secondary sewage treatment.

4. That Defendant contemplates future construction of an additional water impounding reservoir to be known as the Hubbard Road Reservoir, which is preliminarily proposed at an elevation of 1115 feet above sea level. That such proposed reservoir encompasses an area of 7,000 acres, 4,000 acres of which the Defendant has already acquired by negotiated purchases as such lands became available.

5. That the proposed elevation of 1115 feet above sea level would inundate the proposed secondary treatment facilities of both the Villages of Middlefield and Burton.

6. That the Defendant has not taken any action to appropriate any lands within the confines of the proposed reservoir.

In view of the foregoing facts, it is ORDERED, ADJUDGED, and DECREED that:

1. The Plaintiff's, the Village of Middlefield's, oral motion to withdraw and dismiss the third cause of action set forth in the Complaint is granted, with prejudice.

2. The Defendant, the City of Akron, may not appropriate properties within the Villages of Middlefield and Burton, which are already devoted to a public use and which appropriation would either destroy the existing use or interfere with it to such an extent as would be tantamount to destruction.

3. That Defendant, the City of Akron, has no special grant or authorization, by the 1911 grant from the State Legislature, to appropriate publicly owned lands already devoted to a public use when such appropriation would wholly defeat or supersede the former use.

4. The Defendant, the City of Akron, does have, by reason of Section 719.031 Revised Code, a right to acquire any cemetery lands of eminent domain.

5. The Defendant, the City of Akron, is not deprived of any rights of eminent domain by reason of its supplying water beyond its corporate limits, to surrounding suburbs or industries.

6. The Plaintiff, Burton Rubber Processing, Inc., is not entitled to any relief prayed for in the Complaint.

7. The Defendant, the City of Akron, has not given notice of its intent to appropriate any lands of the Plaintiffs herein.

8. The Plaintiffs' second cause of action seeking a restraining order, is premature since no effort has been or is now being made by the Defendant, the City of Akron, to appropriate any lands owned by the Plaintiffs herein.

9. Cost to be divided between City of Akron and plaintiff.

LYNN B. GRIFFITH, JR.,
Judge

APPENDIX G

Opinion of the Court of Common Pleas of Trumbull County, Ohio

(Filed September 23, 1970)

No. 81117

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, TRUMBULL COUNTY, SS.

VILLAGE OF MIDDLEFIELD, *et al.*,
Plaintiffs,

VS.

THE CITY OF AKRON, OHIO,
Defendant.

GRIFFITH, *J.*

The facts of the case as disclosed by the evidence are as follows:

In 1911 the Ohio State Legislature authorized and the Governor of the State of Ohio did grant, pursuant to said legislative authority, the right to withdraw water from the Little Cuyahoga River, as well as the conveyance of lands belonging to the state in Summit County for the purpose of the erection of dams thereon.

This grant was to the City of Akron and limited this right to withdraw water to such an amount as would not jeopardize the proper operation of the state canals then in existence. Subsequent thereto, the City of Akron did erect certain reservoirs through the construction of dams to provide for the municipal water supply for the City of Akron. The last reservoir erected was the LaDue Reservoir in 1962.

The evidence was that the water level of the present reservoirs is still going down as a result of the withdrawal of water for the municipal use.

There was further evidence that the City of Akron supplied water to two auto assembly plants, Chrysler and General Motors, both outside of the City of Akron, as well as several outside communities—Stowe, Mogadore, Tallmadge, and Fairlawn, at rates that are somewhat higher to residents of those communities than to residents of the City of Akron.

For several years the City of Akron has been purchasing land as it has become available on the market for the purpose of erecting another reservoir, referred to on exhibits and in testimony as the Hubbard Road Reservoir. This reservoir would encompass some 7,000 acres, and 4,000 acres of land have been acquired by the City of Akron as they have become available.

The City of Akron has furthermore had studies made for the purpose of determining costs and location of such project. There is presently under preparation further details as to the exact location of the proposed reservoir. However, at this point there has been no commitment on behalf of the City of Akron to proceed with the reservoir, and the testimony was that it would be the middle of 1971 before these final plans would be available.

In 1952, the Village of Middlefield constructed what has been referred to as a primary treatment sewage disposal system, consisting of lines and a sewage treatment plant. In 1969, after a number of requests from the State of Ohio to proceed to the secondary treatment state of the sewage processing, the Village of Middlefield acquired a further parcel of land for the purpose of complying with the Ohio Water Pollution Control Board's requirements for further refining of the sewage.

Burton also owns a sewage treatment facility, as well as lines which go together to make up a sewage system for the village. It also is subject to the duress of the Ohio Pollution Control Board to further refine this sewage by a secondary sewage treatment process.

Middlefield had gone to the further extent of obtaining plans for the erection of the secondary processing plant, obtaining bids for the erection thereof, and obtaining a commitment of financing by the Federal Government at an advantageous interest rate. The secondary proposed treatment plants of both Middlefield and Burton would come within the confines of the proposed reservoir which was presently proposed to rise to 1,115 feet above sea level. As a matter of fact, it would come very close to inundating the existing sewage treatment plant. The City of Akron has taken no steps to appropriate any lands within the confines of the proposed reservoir. The Village of Middlefield and Burton, being reluctant to expend large sums of money on a sewage treatment plant with knowledge that this reservoir is being considered by the City of Akron, bring this action for determination of their rights and specifically to determine the following questions:

1. Does the City of Akron have the right to appropriate the property in the Villages of Middlefield and Burton which is being used for public purposes, and which appropriation would destroy this public purpose?

2. Does the City of Akron have the right to appropriate other public lands of the Villages of Middlefield and Burton which may be destroyed or public purpose diminished by reason of this appropriation?

3. Does the City of Akron, under the grant made by the State of Ohio in 1911 have the right of eminent

domain in the County of Geauga where said eminent domain is for the taking of land other than private lands?

4. Does the City of Akron, under the 1911 grant have the right of eminent domain to construct a reservoir for the impounding of water when the water will not only be used by the City of Akron but by users beyond the municipal limits, namely, the various villages and industries heretofore named?

5. Has the City of Akron put either the Villages of Middlefield or Burton on notice of its intention to appropriate so that any subsequent improvements on said land would not be a proper subject for reimbursement in a land appropriation action filed by the City of Akron?

In answering the first two questions, the general proposition is stated in the case of *Blue Ash v. Cincinnati*, 173 O.S. 345:

"Where a municipal corporation to which a general power of eminent domain is given by law seeks to exercise its power with respect to property in another municipal corporation already devoted to public use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction, unless power so to do is expressly authorized or arises by necessary implication."

The evidence is that the secondary treatment plant must be in close proximity to the primary treatment plant and, accordingly, the treatment plants of the Villages of Middlefield and Burton would be effectively destroyed by the appropriation of the village lands for the proposed reservoir.

It was further held in the case of *McMechan v. Board of Education*, 157 O.S. 241:

> "Statutes conferring the power of eminent domain are construed strictly against the appropriation, and only such interest as to quantum and quality of an estate as is expressly authorized by such statutes may be appropriated."

In the case of *Sears v. City of Akron*, 246 U.S. 242, the Court had before it an action to enjoin construction of a reservoir under the 1911 legislation authorizing Akron to use the waters of the various rivers in the area, and in this case it was held that the plaintiff had no right to equitable remedy in the circumstances of this case. However, Justice Brandeis noted:

> "In May, 1911, the Legislature of Ohio granted to the city by special act the right to divert and use forever, for the purpose of its water supply, the Tuscarawas River, the Big Cuyahoga and Little Cuyahoga Rivers, and the Tributaries thereto now wholly or partly owned or controlled by the state, the city already possessing, under the general law of Ohio, power to appropriate for this purpose by condemnation proceedings the property of any private corporation. OGC 3677-3697." Emphasis by the Court.

It would appear that the Supreme Court did not regard the 1911 grant a special grant of any authority to appropriate inasmuch as the City of Akron already had the general power to appropriate. There is no specific grant of authority to appropriate and considering that Akron did possess general appropriation authority, this Court cannot imply a grant or authority from the grant or water rights. Lacking any special authorization to appropriate, this Court concludes that the City of Akron has no right to

appropriate lands of the Village of Burton or the Village of Middlefield.

In regards to lands of the townships used for cemetery purposes, the Court held in Board of Education of the *City of Akron v. Proprietors of the Akron Rural Cemetery*, 110 O.S. 430:

> "Property already appropriated in the proper exercise of the power of eminent domain, cannot be taken for another public use which will wholly defeat or supersede the former use unless power to make such second appropriation be expressly granted."

This was a cemetery association seeking relief. This Court, concluding that there could be no special grant of authority to exercise the power of eminent domain granted in the enactment of 1911, concludes that the City of Akron does not have the right to appropriate the cemetery lands of these townships.

In regards to the county lands, at 14 O.J. 2d 201, it is noted that a county is a subdivision of the state organized for judicial and political purposes under the provision of the Ohio Constitution and, under the grant of 1911, the State of Ohio did grant to the City of Akron the right to use properties of the state within Summit County and provision was made for determining the value thereof. There was no special grant of any right to appropriate lands of any political subdivision outside of Summit County, and such a grant could not be implied from the circumstances of the case. To obtain this authority would require legislative action which heretofore has not been taken.

Considering Question No. 3 on the facts and law set out above, it is the conclusion of this Court that the City of Akron does not have, under the grant made by the State

of Ohio in 1911, the right of eminent domain over the cemetery lands of the townships, the highways of Geauga County, or the lands held by the villages for sewage treatment facilities.

In regards to the fourth question presented, the City of Akron has found it necessary, in providing for the welfare of its citizens, to provide water to the surrounding suburbs, as well as to industrial plants which provide employment for the area. It is the conclusion of this Court that the fact the City of Akron provides water for adjoining communities as well as plants outside of its corporate limits, does not deprive it of the right of eminent domain on the grounds that it indicates the water was not necessary for the City of Akron. Accordingly, any relief sought by the Burton Rubber Processing, Inc., is denied.

In regards to the last question, which would appear to only have merit in regards to future acquisitions, this Court concludes from the evidence that there has never been notice by the City of Akron of its intent to appropriate any lands of Middlefield or Burton.

As to the third cause of action, which is an action for damages, inasmuch as the Court concludes that the Village of Middlefield has and had at all times the right to erect its sewage treatment plant, it cannot now seek to recover damages for the caution it exercised in proceeding with the erection of said project. This was the caution of a prudent businessman. However, it cannot be said to be the result of Akron's actions, which merely stated that it would rely upon its legal rights in determining any obligation it might have to Middlefield for any land appropriated. Accordingly, the Court would entertain a motion for summary judgment in regards to the third cause of

action by the City of Akron, which motion the Court would consider upon the evidence in this case heretofore submitted, as well as any further evidence tendered in regards to the matter of liability.

LYNN B. GRIFFITH, JR.
Judge of the Court of Common Pleas

APPENDIX H

Constitution of the United States
Article I, Section X

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payments of debts; pass any bill of attainder, ex post facto law, *or law impairing the obligation of contracts,* or grant any title of nobility.

No State shall, without the consent of Congress, lay any imposts or duties or imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net procedure of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay. (Emphasis added.)

Amendment XIV, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of* life, liberty, or *property, wtihout due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (Emphasis added.)

Constitution of the State of Ohio
Article XVIII, Section 3

3. Powers.

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Adopted Sept. 3, 1912.)

Article XVIII, Section 4

4. Public utilities; acquisition.

Any municipality may acquire, construct, own, lease, *and operate within or without its corporate limits, any public utility* the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. *The acquisition of any such public utility may be by condemnation or otherwise,* and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person suppying to the municipality or its inhabitants the service or product of any such utility. (Adopted Sept. 3, 1912.) (Emphasis added.)

APPENDIX I

Ohio Revised Code

§123.69. Sale or lease of water power; fixing rental. (GC §§14009, 14010)

Whenever, in the opinion of the director of public works, there shall be any surplus water in any of the state canals, or in any of the feeders or reservoirs, or at any dams created by the state for the purpose of supplying any of said canals with water, or erected for improving the navigation of any river, over and above the quantity of water which may be required for the purpose of navigation, the director may sell or lease the right to use such surplus water for hydraulic or other purposes, for any term not exceeding twenty-five years for a certain annual rental, or otherwise, as he deems most beneficial for the interest of the state, subject to such conditions, reservations, and restrictions as he deems necessary and proper. All rentals shall be fixed by the direction with the approval of the governor and attorney general.

This section shall not be construed to authorize the director to sell or lease the right to use water at any time for any purposes or to such an extent as to prejudice, abrogate, or supersede any of the water rights granted by the state to the city of Akron by the act contained in Volume 102, Ohio Laws, page 175.

This section extends to and includes the water passing round the locks, from one level to another, on either of the canals of this state.

§717.01. Powers of municipal corporations.

Each municipal corporation may:

(A) Acquire by purchase or condemnation real estate with or without buildings thereon, and easements or interests therein;

(B) Extend, enlarge, reconstruct, repair, equip, furnish, or improve a building or improvement which it is authorized to acquire or construct;

(C) Erect a crematory or provide other means for disposing of garbage or refuse, and erect public comfort stations;

(D) Purchase turnpike roads and make them free;

(E) Construct wharves and landings on navigible waters;

(F) Construct infirmaries, workhouses, prisons, police stations, houses of refuge and correction, market houses, public halls, public offices, municipal garages, repair shops, storage houses, and warehouses;

(G) *Construct or acquire water works for supplying water to the municipal corporation and the inhabitants thereof and extend the water-works system outside of the municipal corporation limits;*

(H) Construct or purchase gas works or works for the generation and transmission of electricity, for the supplying of gas or electricity to the municipal corporation and the inhabitants thereof;

(I) Provide grounds for cemeteries or crematories, enclose and embellish them, and construct vaults or crematories;

(J) Construct sewers, sewage disposal works, flushing tunnels, drains, and ditches;

(K) Construct free public libraries and reading rooms and free recreation centers;

(L) Establish free public baths and municipal lodging houses;

(M) Construct monuments or memorial buildings to commemorate the services of soldiers, sailors, and marines of the state and nation;

(N) Provide land for and improve parks, boulevards, and public playgrounds;

(O) Construct hospitals and pesthouses;

(P) Open, construct, widen, extend, improve, resurface or change the line of any street or public highway;

(Q) Construct and improve levees, dams, wasteways, waterfronts, and embankments and improve any watercourse passing through the municipal corporation;

(R) Construct or improve viaducts, bridges, and culverts;

(S) (1) Construct any building necessary for the police or fire department;

(2) Purchase fire engines or fire boats;

(3) Construct water towers or fire cisterns;

(4) Place underground the wires or signal apparatus of any police or fire department;

(T) Construct any municipal ice place for the purpose of manufacturing ice for the citizens of a municipal corporation;

(U) Construct subways under any street or boulevard or elsewhere;

(V) Acquire by purchase, gift, devise, bequest, lease, condemnation proceedings, or otherwise, real or personal, property, and thereon and thereof to establish, construct, enlarge, improve, equip, maintain, and operate airports, landing fields, or other air navigation facilities, either within or without the limits of a municipal corporation, and acquire by purchase, gift, devise, lease, or condemnation proceedings rights of way for connections with highways, waterways, and electric, steam, and interurban railroads, and improve and equip such facilities with structures necessary or appropriate for such purposes; no municipal corporation may take or disturb property or facilities belonging to any public utility or to a common carrier engaged in interstate commerce, which property or facilities are required for the proper and convenient operation of such utility or carrier, unless provision is made for the restoration, relocation, or duplication of such property or facilities elsewhere at the sole cost of the municipal corporation;

(W) Provide by agreement with any regional airport authority, created under section 308.03 of the Revised Code, for the making of necessary surveys, appraisals, and examinations preliminary to the acquisition or construction of any airport or airport facility and pay the portion of the expense thereof as set forth in such agreement;

(X) Provide by agreement with any regional airport authority created under section 308.03 of the Revised Code, for the acquisition, construction, maintenance, or operation of any airport or airport facility owned or to be owned and operated by such regional airport authority or

owned or to be owned and operated by such municipal corporation and pay the portion of the expense thereof as set forth in such agreement;

(Y) Acquire by gift, purchase, lease, or condemnation, land, forest, and water rights necessary for conservation of forest reserves, water parks, or reservoirs, either within or without the limits of the municipal corporation, and improve and equip the forest and water parks with structures, equipment, and reforestation necessary or appropriate for any purpose for the utilization of any of the forest and water benefits that may properly accrue therefrom to the municipal corporation;

(Z) Acquire real property by purchase, gift, or devise and construct and maintain thereon public swimming pools either within or without the limits of the municipal corporation.

"Airport," "landing field," and "air navigation facility," as defined in section 4561.01 of the Revised Code, apply to division (V) of this section.

As used in divisions (W) and (X) of this section "airport" and "airport facility" have the meaning defined in section 308.01 of the Revised Code. (Emphasis added.)

§719.01. Appropriation of property by municipal corporations.

Any municipal corporation may appropriate, enter upon, and hold real estate within its corporate limits:

(A) For opening, widening, straightening, changing the grade of, and extending streets, and all other public places, and for this purpose, the municipal corporation may appropriate the right of way across railway tracks and lands held by railway companies, where such appropriation will

not unnecessarily interfere with the reasonable use of such property, and for obtaining material for the improvement of streets and other public places;

(B) For parks, park entrances, boulevards, market places, and children's playgrounds;

(C) For public halls and offices, and for all buildings and structures required for the use of any municipal department;

(D) For prisons, workhouses, houses of refuge and correction, and farm schools;

(E) For hospitals, pesthouses, reformatories, crematories, and cemeteries;

(F) For levees, wharves, and landings;

(G) For bridges, aqueducts, viaducts, and approaches thereto;

(H) For libraries, university sites, and grounds therefor;

(I) For construing, opening, excavating, improving, or extending any canal or watercourse, located in whole or in part within the limits of the municipal corporation or adjacent and contiguous thereto, and which is not owned in whole or in part by the state, or by a company or individual authorized by law to make such improvements;

(J) For sewers, drains, ditches, public urinals, bathhouses, water closets, and sewage and garbage disposal plants and farms;

(K) For natural and artificial gas, electric lighting, heating, and power plants, and for supplying the product thereof;

(L) For establishing esplanades, boulevards, parkways, park grounds, and public reservations in, around, and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air, and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto;

(M) *For providing a water supply for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites, and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without its limits; and for such purpose and* [*any*] *such municipal corporation may appropriate, in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code, any property or right or interest therein, previously acquired by any private corporation for any purpose by appropriation proceedings or otherwise, and either party to such appropriation proceedings shall have the same right to change of venue as is given in the trial of civil actions;*

(N) For the construction or operation of street, interurban, suburban, or other railways or terminals and the necessary tracks, way stations, depots, terminals, workshops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, machine shops, bridges, and other appurtenances for the transportation of persons, packages, express matter, freight, and other matter, in, from, into, or through the municipal corporation; and for such purpose any municipal corporation may appropriate any property within or without its corporate limits; and

any municipal corporation may appropriate any property, right, or interest therein previously acquired by any private or public utility corporation for any purpose by appropriate proceedings, as well as the right to cross on, over, or under any street, avenue, alley, way, or public place or part thereof of any other municipal corporation, township, or county;

(O) For establishing airports, landing fields, or other air navigation facilities, either within or without the limits of a municipal corporation for aircraft and transportation terminals, with power to impose restrictions on any part thereof and leasing such part thereof as is desired for purposes associated with or incident to such airports, landing fields, or other air navigation facilities and transportation terminals, including the right to appropriate a right of way for highways, electric, steam, and interurban railroads leading from such airport or landing field to the main highways or the main line of such steam, electric, or interurban railroads, as are desired; all of which are hereby declared to be public purposes.

Division (O) of this section does not authorize a municipal corporation to take or disturb property or facilities belonging to any public utility or to a common carrier engaged in interstate commerce, which property or facilities are required for the proper and convenient operation of such utility or carrier, unless provision is made for the restoration, relocation, or duplication of such property or facilities elsewhere, at the sole cost of the municipal corporation.

The powers conferred upon municipal corporations by this section shall be exercised for the purposes and in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code. (Emphasis added.)

§1523.12. Right of subdivisions to use water preserved. (GC §412-13)

Sections 1523.01 to 1523.13, inclusive, of the Revised Code do not authorize any reduction in the quantity or any impairment in the quality of the water in any watershed, stream, or basin, developed or undeveloped, from which any political subdivision is, at the time the chief of the division of water proposes and is proceeding to construct in such watershed, stream, or basin any property or rights in such watershed, stream, or basin for the purpose of acquiring a water supply for itself or its inhabitants for either domestic, industrial, or other uses. Such sections do not authorize the chief to sell or lease the right to use water at any time for any purpose or to such an extent as to prejudice, abrogate, or supersede any of the water rights granted by the state to the city of Akron as provided in volume 102, Ohio Laws, page 175, sections 1 to 3, inclusive.

APPENDIX J

Ohio General Code

AN ACT

To provide for granting to the City of Akron, Ohio, the right to use and occupy certain waters and lands of the state for waterworks and park purposes. (102 v. 175.)

[Sec. 14203-1.]. Akron city permitted to occupy and use certain waters and lands of the state. §1. That there is hereby granted to the city of Akron, in the county of Summit, and state of Ohio, the right to divert and use forever for the purpose of supplying water to said city of Akron and the inhabitants thereof, the Tuscarawas River, the Big Cuyahoga River, and the Little Cuyahoga River, and the tributaries thereto, now wholly or partly owned or controlled by the state and used for the purpose of supplying water to the northern division of the Ohio canal, provided, however, and this grant is upon the condition that at no time shall said City use the waters of any such stream, to such extent or in such manner as to diminish or lessen the supply now necessary, to maintain the flow in and through the canal as said canal now exists or as hereafter may become necessary for navigation purposes for an enlarged canal and upon the further condition that the city of Akron shall at all times save the state harmless from all claims arising from such grant and construction thereunder.

[Sec. 14203-2.]. Storage rights. §2. There is hereby granted to said city of Akron for the waterworks purposes as aforesaid the right to enter in and upon and occupy the lands of the state in said Summit county to develop additional storage either by the construction of new reservoirs or dams, or the enlargement of those already constructed by the state on said rivers, always provided

that said construction or enlargement will not result in any interference with or diminution of the supply now necessary for said canal for navigation purposes. And, provided further, that before any such construction of reservoirs or dams, or enlargement of reservoirs or dams now existing shall be commenced, the plans and specifications therefor be first approved by the chief engineer of the state board of public works. And further provided, that any diversion or impounding on the lands of the state of said Tuscarawas River and the tributaries thereto, by said City of Akron, shall be east of highway known as South Main street extended south. And if the waters of said Tuscarawas river are impounded, used or diverted by said city, the amount of the flow as now or hereafter used and controlled by the state shall not be diminished by such impounding, use or diversion by said city during the months of June, July, August, September, October, and November; and at no time shall said city of Akron take or use from any reservoir constructed on the Tuscarawas river an amount of water in excess of an annual average of fifteen million gallons per day, unless with the approval of the board of public works and upon such terms and conditions as may be agreed upon between the said board of public works and said city of Akron, and the chief engineer of the said board of public works shall at all times have access to said property for the purpose of ascertaining the amount of water that is being used by said City of Akron.

Arbitrators. The governor shall appoint a commission of three arbitrators to fix the compensation to be paid the state by the city of Akron for any lands or property, exclusive of water, taken by the city of Akron under the provisions of this act.

Money to credit of general revenue fund. Provided that any money accruing to the state under this act shall

be paid into the state treasury to the credit of the general revenue fund.

[Sec. 14203-3.]. Grant by governor. §3. The governor, upon behalf of the state shall execute and deliver to the city of Akron, Summit county, Ohio, a grant of the right to use forever the waters of such streams, as herein provided, under the provisions herein set forth and for the purposes herein stated.

The attorney general shall prepare the form of said grant.

APPENDIX K

Resolution No. 3021 of the Akron City Council

Resolution No. 3021, accepting the grant from the State of Ohio, of certain water rights.

Be it resolved by the Council of the City of Akron, State of Ohio:

That the grant of the Governor of the State of Ohio, of certain rights in certain waters and lands of the said State of Ohio, under and in pursuance of a bill entitled "A Bill to provide for granting to the City of Akron, Ohio, the right to use and occupy certain waters and lands of the state for waterworks and park purposes," passed May 17, 1911, be and the same is hereby accepted.

Passed November ....., 1911.

Resolution No. 3241 of the Akron City Council

Resolution No. 3241, declaring intention to appropriate property for water supply purposes.

Be it resolved by the Council of the City of Akron, State of Ohio, three-fourths of all the members elected thereto concurring by reason of this resolution being an emergency measure:

Section 1. That, by virtue and in exercise of the power and authority contained in House Bill No. 357 of the Ohio Legislature contained in Vol. 102 of the Ohio Laws, page 175, passed by the Legislature of the State of Ohio, May 17, 1911, and in partial execution thereof, and by virtue and in exercise of every other power and authority thereto enabling, it hereby declares its intention to appropriate for the purpose of supplying water to said City of Akron and the inhabitants thereof, the following

described property and any and all rights or interest therein, to wit: All the waters of the Cuyahoga River at and above a line heretofore fixed as the axis of a proposed dam to be built by said City, in the Township of Franklin, County of Portage and State aforesaid; said line of proposed appropriation being approximately twelve hundred (1200) feet northeast from the point where the Cleveland & Pittsburg Division of the Pennsylvania Railroad now crosses said Cuyahoga River, and being shown upon a plan dated June, 1911, prepared by Frank A. Barbour and Edward G. Bradbury and bearing the inscription, "City of Akron Improvement of Water Supply, Plan showing Development of Cuyahoga River, Sheet 9"; and also all the waters of all the tributaries of said Cuyahoga River, above said line of proposed appropriation, and all the waters which may flow into and from said Cuyahoga River and the tributaries thereof above said line, for the purpose of diverting the same for the purpose aforesaid, at or near said line and not elsewhere.

Section 2. This resolution is declared to be an emergency measure.

Section 3. This resolution shall take effect from and after the earliest period allowed by law.

Passed May 27, 1912.

Ordinance No. 3396 of the City of Akron

Ordinance No. 3396, to appropriate property for water supply purposes:

Be it ordained by the council of the City of Akron, State of Ohio, two-thirds of all members elected thereto concurring:

Section 1. That by virtue and in exercise of the power and authority contained in Vol. 102 of the Ohio Laws, page 175, passed by the Legislature of the State of Ohio, May 17, 1911, and in partial execution thereof, and by virtue and in exercise of every other power and authority thereto enabling, the following described property and any and all rights or interest therein, be and the same is hereby appropriated to public use for the purpose of supplying water to said City of Akron and the inhabitants thereof, to wit: All the waters of the Cuyahoga River at and above a line heretofore fixed as the axis of a proposed dam to be built by said city, in the Township of Franklin, County of Portage and State aforesaid; said line of appropriation being approximately twelve hundred (1200) feet northeast from the point where the Cleveland & Pittsburg Division of the Pennsylvania Railroad now crosses said Cuyahoga River, and being shown upon a plan dated June, 1911, prepared by Frank A. Barbour and Edward G. Bradbury and bearing the inscription, "City of Akron Improvement of Water Supply, Plan showing Development of Cuyahoga River, Sheet 9"; and also all the waters of all the tributaries of said Cuyahoga River, above said line of appropriation, and all the waters which may flow into and from said Cuyahoga River and the tributaries thereof above said line, for the purpose of diverting the same for the purpose aforesaid, at or near said line and not elsewhere.

Section 2. That the solicitor be and is hereby authorized and directed to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for such property.

Section 3. That the costs and expenses of said appropriation be paid out of the proceeds of the sale of bonds issued under authority of an ordinance entitled "Ordinance

No. 3233, to issue bonds for the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the water works of the City of Akron, Ohio, and for the purpose of supplying water to said city and the inhabitants thereof," passed May 27, 1912.

Section 4. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed Aug. 26, 1912.

APPENDIX L

Governor's Deed

Know Ye All Men By These Presents, That, whereas, on May 17, 1911, the General Assembly of the State of Ohio passed a bill entitled "A Bill to provide for granting to the City of Akron, Ohio, the right to use and occupy certain waters and lands of the state for waterworks and park purposes"; which said bill was presented to the Governor, May 18, 1911, and was not signed or returned to the House wherein it originated within ten days after being so presented, exclusive of Sundays and the day said bill was presented; and,

Whereas, by the act of the General Assembly of the State of Ohio, so enacted, it was provided:

> "Section 1. That there is hereby granted to the city of Akron, in the county of Summit, and state of Ohio, the right to divert and use forever for the purpose of supplying water to said City of Akron and the inhabitants thereof, the Tuscarawas river, the big Cuyahoga and little Cuyahoga rivers, and the tributaries thereto, now wholly or partly owned or controlled by the state and used for the purpose of supplying water to the northern division of the Ohio canal, provided, however, and this grant is upon the condition that at no time shall said city use the waters of any such stream to such extent or in such manner as to diminish or lessen the supply now necessary, to maintain the flow in and through the canal as said canal now exists or as hereafter may become necessary for navigation purposes for an enlarged canal and upon the further condition that the city of Akron shall at all times save the state harmless from all claims arising from such grant and construction thereunder.

"Section 2. There is hereby granted to said city of Akron for the waterworks purposes as aforesaid the right to enter in and upon and occupy the lands of the state in said Summit county to develop additional storage either by the construction of new reservoirs or dams, or the enlargement of those already constructed by the state on said rivers, always provided that said construction or enlargement will not result in any interference with or diminution of the supply now necessary for said canal for navigation purposes. And, provided further, that before any such construction of reservoirs or dams, or enlargement of reservoirs or dams now existing shall be commenced, the plans and specifications therefor be first approved by the chief engineer of the state board of public works. And further provided that any diversion or impounding on the lands of the state of said Tuscarawas river and the tributaries thereto, by said city of Akron, shall be east of highway known as South Main street extended south. And if the waters of said Tuscarawas river are impounded, used or diverted by said city, the amount of the flow as now or hereafter used and controlled by the state shall not be diminished by such impounding, use or diversion by said city during the months of June, July, August, September, October and November; and at no time shall said city of Akron take or use an amount of water in excess of an annual average of fifteen million gallons per day, unless with the approval of the board of public works and upon such terms and conditions as may be agreed upon between the said board of public works and said city of Akron, and the chief engineer of the said board of public works shall at all times have access to said property for the purpose of ascertaining the amount of water that is being used by said city of Akron.

"The governor shall appoint a commission of three arbitrators to fix the compensation to be paid the state by the city of Akron for any lands or property, exclusive of water, taken by the city of Akron under the provisions of this act.

"Provided that any money accruing to the state under this act shall be paid into the state treasury to the credit of the general revenue fund.

"Section 3. The governor, upon behalf of the state shall execute and deliver to the city of Akron, Summit county, Ohio, a grant of the right to use forever the waters of such streams, as herein provided, under the provisions herein set forth and for the purposes herein stated.

"The attorney general shall prepare the form of said grant."

Now, Therefore, I, Judson Harmon, Governor of Ohio, upon behalf of the State of Ohio, and under and by virtue of the authority in me vested by the said act of the General Assembly of the State of Ohio, do hereby grant to the city of Akron, Summit County, Ohio, the right to divert and use forever, for the purpose of supplying water to said city of Akron, and the inhabitants thereof, and for no other purpose, the waters of the Tuscarawas River, the Big Cuyahoga River and the Little Cuyahoga River, and the tributaries thereto, now wholly or partly owned and controlled by the state of Ohio, and used for the purpose of supplying water to the northern division of the Ohio Canal, together with the right to enter in and upon, for the waterworks purposes as aforesaid, and for no other purposes, and to occupy for such purposes, the lands of the state in said Summit County, to develop additional storage, either by the construction of new reservoirs or dams or

the enlargement of those already constructed by the state on said rivers.

To Have and To Hold the said rights, with the appurtenances thereof, unto the said city of Akron, Summit County, Ohio, forever.

Provided, however, and this grant is upon the following conditions, to wit:

Said city of Akron shall at no time use the waters of any such stream, to such extent or in such manner as to diminish or lessen the supply now necessary to maintain the flow in and through the northern division of the Ohio canal, as said canal now exists; or such supply as hereafter may become necessary for navigation purposes for an enlarged canal;

The said city of Akron shall at all times save the state of Ohio harmless from all claims arising from such grant, and from any construction thereunder;

Any construction or enlargement of reservoirs or dams, under and by virtue of this grant, shall not result in any interference with, or diminution of, the supply now necessary for said northern division of the Ohio canal for navigation purposes;

Before any such construction of reservoirs or dams, or enlargement of reservoirs or dams now existing, shall be commenced, the plans and specifications therefor shall be first approved by the chief engineer of the state board of public works;

Any diversion or impounding on the lands of the state of said Tuscarawas River, and the tributaries thereto, by said city of Akron, shall be east of the highway known as South Main Street, extended south;

If the waters of said Tuscarawas River are impounded, used or diverted by said city, the amount of the flow as now or hereafter used and controlled by the state shall not be diminished by such impounding, use or diversion, by said city, during the months of June, July, August, September, October and November of any year;

At no time shall said city of Akron take or use from any reservoirs constructed on the Tuscarawas River, an amount of water in excess of an annual average of fifteen million gallons per day, unless with the approval of the Board of Public Works of the State of Ohio, and upon such terms and conditions as may be agreed upon between the said board of public works and the said city of Akron; and the chief engineer of said board of public works shall at all times have access to said property for the purpose of ascertaining the amount of water that is being used by said city of Akron;

In case the said city of Akron shall enter in and upon, or occupy the lands of the state, or any property thereof, exclusive of water, under the provisions of this act, the Governor of Ohio shall appoint a commission of three arbitrators to fix the compensation to be paid to the state by the city of Akron, for any lands or property, exclusive of water, so taken, and the same shall be paid in the amounts and upon the terms fixed by such commission.

And the said city of Akron, by its officers thereunto authorized, by law, hereby covenants that it will faithfully perform each and every condition hereinbefore set forth.

And it is further provided that upon breach of any of the conditions hereinbefore set forth, by the said city of Akron, the rights of said city of Akron under this grant shall expire and be terminated.

It is understood that the rights intended to be conveyed by this instrument are those set forth in sections One (1) and Two (2) of the bill aforesaid; and the reservations made in this instrument are those referred to in said sections One (1) and Two (2), whether said reservations be mentioned and described in exact harmony with said sections, or not; it being the purpose to make the grants described in said sections, and all of them, subject to all of the conditions and reservations therein mentioned.

In Witness Whereof, I have hereunto set my hand and caused the great seal of the State of Ohio to be affixed this 13th day of October, A. D. 1911.

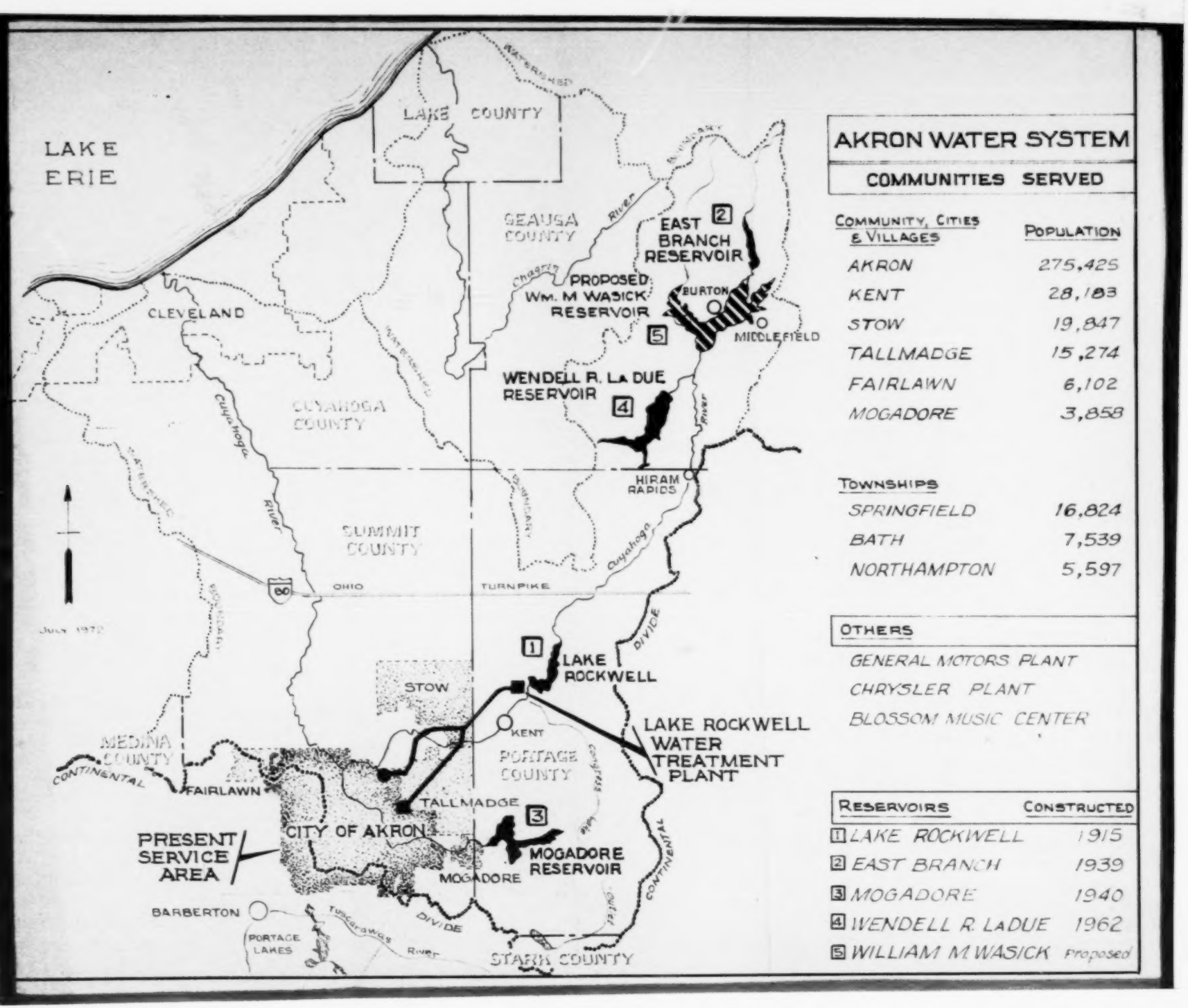
/s/ JUDSON HARMON
(Seal) Governor of the State of Ohio

Recorded in Auditor of State Land Office
Volume No. 13, Easement No. 313

APPENDIX M

Map of Akron Water System

(Attached)



AKRON WATER SYSTEM

COMMUNITIES SERVED

Community, Cities & Villages	Population
AKRON	275,425
KENT	28,183
STOW	19,847
TALLMADGE	15,274
FAIRLAWN	6,102
MOGADORE	3,858

Townships	
SPRINGFIELD	16,824
BATH	7,539
NORTHAMPTON	5,597

OTHERS

- GENERAL MOTORS PLANT
- CHRYSLER PLANT
- BLOSSOM MUSIC CENTER

Reservoirs	Constructed
1 LAKE ROCKWELL	1915
2 EAST BRANCH	1939
3 MOGADORE	1940
4 WENDELL R. LADUE	1962
5 WILLIAM M. WASICK	Proposed

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FILED
SEP 27 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 72-249

OCTOBER TERM, 1972

THE CITY OF AKRON, OHIO,
Petitioner,

vs.

VILLAGE OF MIDDLEFIELD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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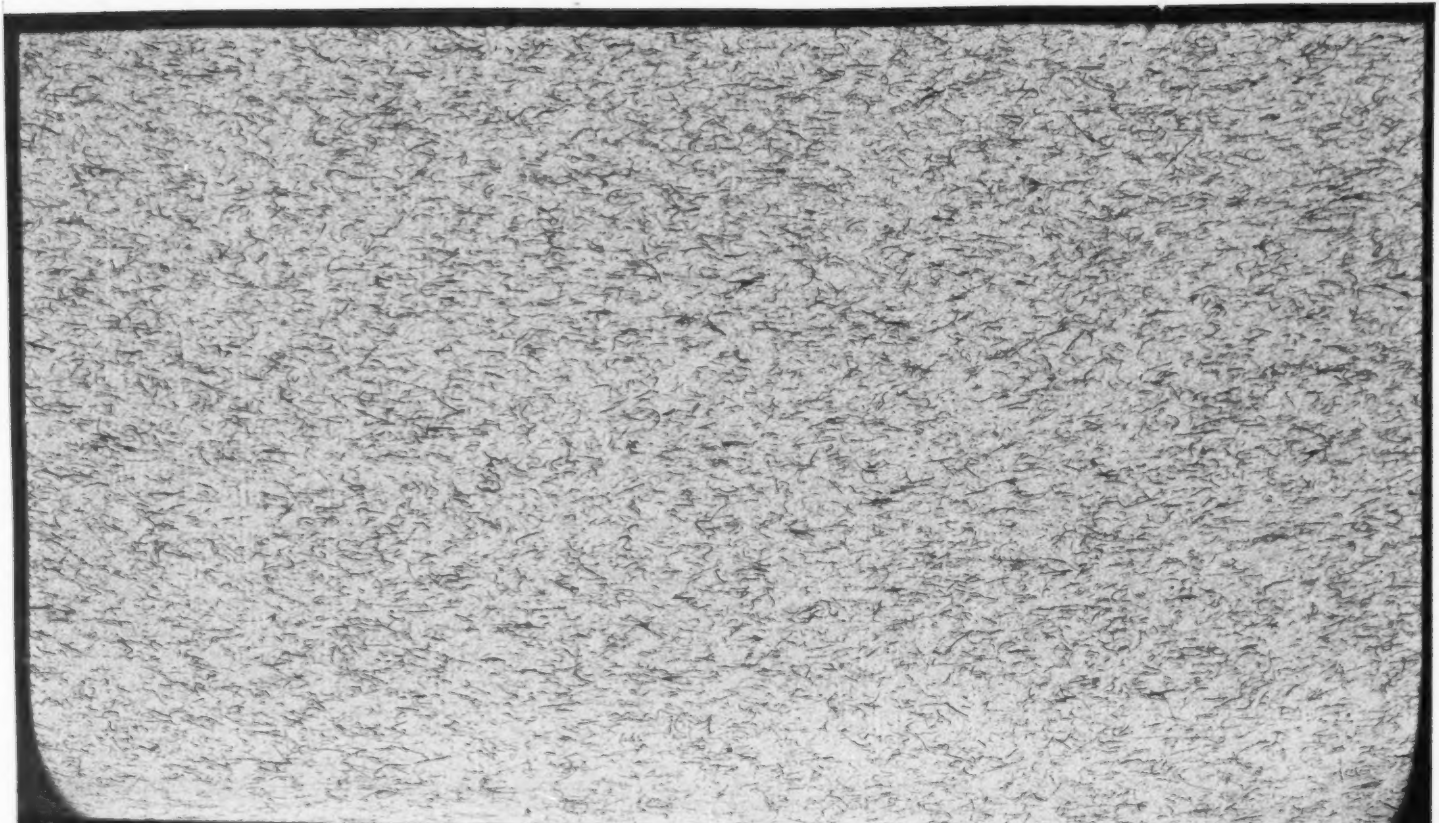

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ARGUMENT

The petitioner in the within matter sets out two constitutional issues, namely, Article I, Section 10: Impairment of Contract; and the 14th Amendment, Section I: Due Process.

It bases these positions on its argument that the courts of Ohio have denied it the right obtained by 1911 legislation by the Ohio State Legislature. It says this legislation and the rights conferred therein constitute a contract between itself and the State of Ohio.

Without taking issue with whether this legislation, in fact, amounts to a contract, it is the position of the respondents now, as it has been throughout this case, that the petitioner received no right to do anything outside the

County of Summit by reason of the 1911 legislation. This legislation in part reads as follows:

> . . . There is hereby granted to said city of Akron for the waterworks purposes as aforesaid the right to enter in and upon and occupy the lands of the state in said Summit county to develop additional storage either by the construction of new reservoirs or dams, or the enlargement of those already constructed by the state on said rivers . . . .
>
> (See page A32, paragraph 3 of Petitioner's Petition.)

The real property involved in this litigation is located in Geauga County.

The court of original jurisdiction, the Common Pleas Court of Trumbull County, in its written opinion relative to this claim of contract impairment and lack of due process, said as follows:

> . . . There was no special grant of any right to appropriate lands of any political subdivision outside of Summit County, and such a grant could not be implied from the circumstances of the case. To obtain this authority would require legislative action which heretofore has not been taken.
>
> (See page A18, paragraph 3 of Petitioner's Petition, line 7.)

The Eleventh District Court of Appeals, in its written opinion affirming the lower court's decision held as follows:

> . . . We hold that the 1911 grant did not give special power to the City of Akron to appropriate lands beyond Summit County so as to be able to reduce to possession certain waters. The grant of 1911 permits the City of Akron:
>
> a. The right to use certain waters
> b. The right to come upon these waters for the purpose of constructing reservoirs *in Summit County.*

Therefore, the City of Akron's right to appropriate outside its own territorial boundaries is only the same right as any municipality might have and is not expanded by the 1911 grant.

(See page A6, paragraphs 2 and 3 of Petitioner's Petition.)

Further, the petitioner in its petition made reference to *Sears, Trustee v. City of Akron,* 246 U.S. 242, stating on page 11 of its petition that the U.S. Supreme Court in this *Sears* case has already held the petitioner to be possessed of special property rights and stating further on page 13 that the Ohio courts have chosen to ignore the *Sears* case. This is not so.

The court of original jurisdiction in its ruling as referred to above, did make specific reference to the *Sears* case, as follows:

> In the case of *Sears v. City of Akron,* 246 U.S. 242, the Court had before it an action to enjoin construction of a reservoir under the 1911 legislation authorizing Akron to use the waters of the various rivers in the area, and in this case it was held that the plaintiff had no right to equitable remedy in the circumstances of this case. However, Justice Brandeis noted:
>
> "In May, 1911, the Legislature of Ohio granted to the city by special act the right to divert and use forever, for the purpose of its water supply, the Tuscarawas River, the Big Cuyahoga and Little Cuyahoga Rivers, and the Tributaries thereto now wholly or partly owned or controlled by the state, the city already possessing, under the general law of Ohio, power to appropriate for this purpose by condemnation proceedings the property of any private corporation. OGC 3677-3697."
>
> It would appear the Supreme Court did not regard the 1911 grant a special grant of any authority to appropriate inasmuch as the City of Akron already had the general power to appropriate. There is no specific

grant of authority to appropriate and considering that Akron did possess general appropriation authority, this Court cannot imply a grant or authority from the grant or water rights. Lacking any special authorization to appropriate, this Court concludes that the City of Akron has no right to appropriate lands of the Village of Burton or the Village of Middlefield.

(See Pages A17 and A18 of Petitioner's Petition.)

CONCLUSION

With regard to the 1911 grant, there was no constitutional question involved. The *Sears* case and the court of original jurisdiction and the Court of Appeals in this case correctly found the 1911 grant only applies to State-owned land in Summit County and has no application to lands in Geauga County. Upon appeal, the Supreme Court of Ohio refused jurisdiction.

Respectfully submitted,

GENE HENRY

Attorney for Respondents